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Can the Independent Chiefs of Savage Tribes cede to any Private Individual the whole or a part of their States, together with the Sovereign Rights which belong to them in conformity with the Traditional Customs of the Country?

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Can the Independent Chiefs of Savage Tribes cede to any Private Individual the whole or a part of their States together with the Sovereign Rights which belong to them in conformity with the Traditional Customs of the Country?

THE question as put presents two aspects. It must be considered,

Firstly. From the point of view of the rights of the grantor.

Secondly. From the point of view of the rights of the grantee.

Firstly. In examining this question with regard to the law of nations, we must in the first place ask ourselves whether the chiefs of savage tribes can as a rule make treaties, conventions, and cessions of territory, or in other words whether the tribes they represent are considered as States, capable of making international treaties, which should be respected as such by all civilised and non-civilised nations.

From the fifteenth, down to an advanced date in the nineteenth century, the rules of the law of nations were looked upon as being to some extent an exclusive privilege of the Christian races, and as establishing regular relations between these alone.

As regards uncivilised races, they were not considered as forming part of the juridical community, which was established amongst Christian States by international law, and it was only by Article 7 of the Treaty of Paris of March 30, 1856, that the 'Sublime Porte was permitted to participate in the advantages of international law and of the European Concert.' It is evident that the Christian States could not allow those nations to participate in the advantages of the law of nations, who did not recognise this law as obligatory upon themselves, and who did not practice its precepts. Publicists and moralists taught that in their relations with heathen or savage populations, Christian sovereigns ought always to conduct themselves honestly, and observe the rules of justice, of equity, and of Christian morality It would be too long to recount here the details of the discussions entered into by writers of the sixteenth and seventeenth

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centuries, as to the line of conduct to be observed by the European nations towards the Indians, &c.

It may suffice to say that the relations of the European States with other nations were not guided by any fixed rules, that they varied considerably according to the power and importance of the foreign nations, according to the more or less frequent communication between them and the Europeans, and according to the manners and customs prevalent among them.[1]

The conduct of the European nations towards feeble races, inhabiting newly discovered portions of the world, and not forming communities sufficiently strong to defend themselves, was often inhuman and cruel.

Thanks to the progress made by humane ideas, to the better practice of Christian morality, and to the greater sway exercised by the principles of international justice in our days, feeble, half-savage races who are deprived as yet of the benefits of civilization, are no longer considered merely as prey for the rapacity of civilized nations, or as furnishing a field for their enterprise.

Every creature in human form is considered as a member of the one great human family, a child of the common Father, animated by the same Divine breath, sharing a common destiny and deserving of the respect due to human dignity.

These ideas have influenced jurisconsults and publicists, have pervaded their doctrines, and have happily prevailed in practice.

Neither imperfectly organised communities of savage tribes nor their territories, are at this date looked upon as things without owners, belonging to the first claimant, that is to say, to the first comer able to enforce submission. Absence of civilisation can no longer serve as a pretext for their violent subjugation by a civilised nation.

The science of the law of nations is not as yet fully formulated, and it is a science which above all others we neither can nor ought to formulate *a priori*. Philosophy is undoubtedly its fundamental principle, but it rests on an actual basis of facts, of history, and of established doctrine.

[1] Heffter § 7, p 14 '. . . . . With respect to non-Christian States, as well as to those which have not yet been admitted in regular form into the circle of the European family, the application of the same rules is altogether voluntary, and founded on a purely conventional reciprocity. Relations with them are formed according to the requirements of policy and morality.'

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What are the conditions under which a State, as such, can exist, and be capable of negotiating treaties?

'A certain number of men and families who having congregated together and fixed their abode in a country, associate themselves and submit to a common chief with the purpose of ensuring the safety of all, form a State,' says Klüber[1] and G. F. de Martens gives a like definition.[2]

'Sovereignty,' continues Klüber,[3] 'in its full meaning, consists in the entire body of rights belonging to an independent State as such. It includes, (1) the complete independence of the State as regards foreign nations; (2) the legitimate power of the Government, or the authority implied by the existence of the State.'

The same author[4] says, 'Sovereignty is acquired by a State either at the time of its formation, or when it legitimately frees itself from a condition of dependence. To be valid it does not require to be recognised or guaranteed by any foreign power, provided that the claim shall not be defective.'

It would be useless to multiply extracts. The principles established by Klüber (from a juridical point of view), concerning sovereignty, the independence and the equality of States, are likewise professed by all writers on the subject. We will confine ourselves to referring to Heffter, § 15, 16 (pp. 32–34); § 23 (pp. 42–43); § 26 and 27 (pp. 47–49); Wheaton V. I. pp. 32 and 43 p. Vattel, V. I. ch. i. sect. 4. W. E. Hall. International Law. § 2–4 (pp. 16–20); § 6–8 (pp. 34-37); § 9 and 10 (pp. 39–42); Calvo, Droit International & T. § 39 and 41 (pp. 143, 144, 146, 147).

Tribes inhabiting a settled territory, and represented by their chiefs, form therefore independent States. Hence as a first consequence, the territories they occupy are not things without masters (*res nullius*), and cannot be occupied by other states. Only territories *without masters*, that is to say, those on which no sovereign power is as yet established can be rightfully available for occupation.

Let us refer to the authorities on the right of occupation.

'Christliche Völker können Lande, welche die Wilden schon

[1] *Droit des gens moderne*, § 20.
[2] *Einleitung in das positive europäische Völkerrecht*, p. 1.
[3] *Ibid.* § 21.
[4] *Ibid.* § 23.

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wirklich occupirt haben, nicht mit Recht in Besitz nehmen,' says George Frédéric von Martens,[1] 'Christian nations have no right to take possession of countries which the savages have already actually occupied.'

Klüber[2] says: 'A state may acquire things belonging to no one (*res nullius*) by *occupation* (original), and the property of others by means of convention (derived occupation). In order that the occupation shall be legitimate, the thing must be susceptible of exclusive property; it must belong to no one, (*a*) the State must have the intention of acquiring the property, &c.'

In the note (*a*) the author says, 'Property is acquired of right by an effective occupation; it is preserved by continued possession. Consequently, *a nation is not authorised by any qualities whatever, especially not by a higher order of culture of any kind, to take by force that which belongs to another nation, it must not deprive even savages or nomads of their property.*'

The author relies upon Günther, Völkerrecht, II. p. 102 following. See especially the beautiful and energetic passage of Heffter, 'Le Droit international public,' § 70. I. (pp. 141–142) 'Droit d'occupation.'

§ 70. In order to make occupation valid, the property must be without owners; and to the intention of acquiring dominion over it, must be added the fact of taking effective possession.—Let us examine these three conditions. I. Occupation can only apply to property which, although susceptible of being possessed, has no master. It does not extend to persons; they can only be in a state of submission, either voluntary or forced. Occupation applies especially to uninhabited countries and islands, or to those which are only partially occupied; but no power on earth has the right to impose its laws upon wandering tribes, or even upon savages. Its subjects may seek to form commercial relations with these latter, may sojourn amongst them in case of necessity, may ask them for food and necessaries, and may even negotiate with them, the voluntary cession of a portion of territory, with a view to colonisation. Nature, it is true, does not forbid nations to extend their

[1] *Einleitung in das positive europäische Völkerrecht.* Göttingen, 1796, § 31.'
[2] *Droit des gens moderne de l'Europe,* § 125.

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empire on the earth. But neither does it give to any single one of them the right to establish its dominion, wherever it may see fit. Neither the spread of civilization, the development of commercial and industrial interests, nor the opening up of unproductive sources of wealth can render such an attempt justifiable. All that can be granted is, that with a view to the preservation of the human race, nations should be allowed to unite in jointly procuring the opening of the gates of a country previously hermetically closed against their commerce.'

See in the same strain BLUNTSCHLI, *Droit des gens codifié*, § 20 (p. 63).

References of this kind might be multiplied.

Since communities of non-civilised tribes form, according to the law of nations as now received, *independent States*, it follows as a first logical consequence, that these States can no longer be acquired through right of *occupation*, by other States. A second necessary consequence of the same premises is, that these States or their chiefs can make international *treaties* of all kinds; treaties having an obligatory force on the contracting parties, and which should be respected by all other States, unless in some way interfering with their acquired rights.

Let us here remark in passing, with Calvo,[1] that international treaties may be concluded even with nomadic people having neither territory proper nor fixed abode, provided they enjoy a political organisation, and express a common will, through the medium either of their chiefs or of their assemblies.

'In this category may be classed,' adds the same author, 'the Bedouins scattered in the deserts of Arabia, of Syria, of Egypt, and of Barbary in Africa, and the Turcomans who overrun the central plains of Asia.'

'There are agglomerate populations who do not form a State. . . . . But nomads and savages have amongst themselves and with regard to civilised peoples, a law of nations which rests upon the same basis as the law of nations amongst civilised races,' say Funck-Brentano and Sorel.[2]

[1] See Charles Calvo, *Manuel du Droit international public et privé*. Paris, Arthur Bruneau, 1882, § 49 (pp. 85–86). And the same, *Le Droit international théorique et pratique*, 3rd Edit. § 214 (and I. p. 320).

[2] *Précis du Droit des gens*. Paris 1877. No. X. p. 23.

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Much more, therefore, have the tribes forming States and inhabiting a fixed territory, the power of making international treaties.

The savage African tribes possess determined territories. *Being able to make all kinds of treaties, their chiefs can therefore validly cede* their territory, either wholly or in part. We shall see to *whom*, under No. II.

This rule, or rather this consequence of sovereignty, can allow of no doubt theoretically.

'The sovereignty of the State, as understood by international law,' says Klüber, *Droit des Gens moderne de l'Europe*, § 22, 'consisting essentially in independence of all foreign control as to the exercise of the rights of sovereignty, must from its very nature be exercised without regard to the antiquity of the State, to the form of its constitution or government, to the order established for the succession to the throne, to the rank and title of the State or of its sovereign, to the extent of its territory, to the number of its population, or the measure of its political importance, to its customs and religion, or to the state of its general culture, of the commerce of its inhabitants, &c.

And the same author, in § 127, says:

'As for the *Public Domain*, the State has over the things which form part of it all the rights of proprietorship; not only exclusive possession and the right to enjoy as proprietor, but also that of disposing of it at will. The conventions or arrangements which it makes in this respect, either with its subjects or with strangers, are absolutely independent of other governments. There is nothing to prevent the State from alienating its property, from mortgaging it, or from abandoning it. It has the power to acquire by means of accretion.'[1]

We need not go far back to find instances of treaties for the cession of territory and of other contracts between civilised States on the one part and savage tribes on the other part. Modern history from the seventeenth century to the present day furnishes us with numerous examples. It will be sufficient to recall the best-known cases.

In 1620 the English Puritans who had embarked on board

[1] See, in the same sense, *International Law*, by Edward William Hall, M.A. Barrister-at-law. Oxford, 1880. § 35, p, 100.

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the 'Mayflower,' after settling down in the northern region of Virginia, concluded with the Chief or Sachem of the Massasoit Indians a treaty of friendship, the most ancient of the treaties made by New-England.[1]

In 1639 the founders of the colony of New Hampshire concluded conventions with the Indians for the purchase of some portions of land, situate between the Piscataqua and the Merrimac, and there established the community of Exeter.[2]

Later on, William Penn made conventions with the chiefs of Indian tribes. It would be useless here to cite the numerous treaties entered into between the various States of New England and the chiefs of Indian tribes.

Wheaton[3] reports that some of the Indian tribes have recognised *by convention* that they hold their existence entirely at the will of the State within the limits of which they reside; that others retain a limited sovereignty and absolute dominion over the territory they inhabit; and he adds that, by two decrees, of 1831 and 1832, the Supreme Court of the United States decided that the nation of Cherokees, residing within the limits of the State of Georgia, constitute a State or a *distinct political society*; that the numerous treaties made with this nation by the United States, recognise it as a people capable of maintaining the relations of peace and war; that the English Government, which preceded that of the United States, bought their lands under voluntary contracts of sale, and never forced them to sell against their will.

Let us turn from America to Africa and Asia. In the course of the last fifty years England has made thirteen treaties with the chiefs of countries adjacent to the Congo; of these we will specially mention two—one concluded February 11, 1850, with the king and the chiefs of Cabinda; the other concluded June 20, 1854, with divers chiefs of the river Congo.

The treaty concluded by M. Savorgnan de Brazza with King Makoko is one of public notoriety.

To complete the series of historical documents which support the theory that chiefs of savage tribes have full power to make valid treaties and to cede territory, let us recall the recent treaties of December 29, 1877, and January 22, 1878, by

[1] Bancroft, *History of the United States*, V. i. pp. 342-350.

[2] Carlier, *History of the American People*, V. i. p. 300.

[3] *Elements of International Law*, Fr. Trans., V. i. pp. 50, 51.

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which the Sultans of Burnei and Sulu in the island of Borneo ceded a portion of their territories to Mr. Alfred Dent and Baron d'Overbeck.

If from the point of view of international law, it is indisputable that no State, whether civilised or not, has the right to disturb arbitrarily the chiefs of savage tribes in the possession of their sovereignty, the same prohibition protects their grantees, *whoever they may be.*

The grantees have the same rights as the grantors. Under what pretext could another State disturb the grantees? Either the grant is valid—in which case there exists neither reason nor even pretext for interference—or else the grant is void, according to the rules of international law; but then the sovereign who made the cession retains *by law* his complete sovereignty, and no other State can have any right to interfere, nor even to intervene, to prove the nullity of the cession.

II. Let us now consider the second question: Can a concession be made to a *private individual*?

Happily this portion of our work may be abridged by referring to the article, 'The Free Navigation of the Congo,' published by our eminent colleague of the Institute, Sir Travers Twiss, in the fifteenth volume of the *Review of International Law of* 1883 (p. 547). It is true that Sir Travers Twiss occupies himself rather with the question of whether associations, which are not organised into States, can exercise sovereign rights, than with that of whether the rights of sovereignty can be ceded to private individuals.

But the arguments he brings to bear upon his theory apply to a great extent to concessions made to private individuals.

In laying down the starting-point from which they intend to proceed, writers often begin by saying: 'It is a well-known principle,' or else, 'It is a principle in law,' &c., &c., and they prefer this mode of expressing themselves even when their principles are most questionable.

In the article just alluded to, Sir Travers Twiss mentions an article in the *Geographical Review of Paris*,[1] in which M. Delvand says: 'It is a principle of law that States alone can exercise sovereign rights, that no private company can

[1] T. XII. p. 224.

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possess them.' He (Sir Travers Twiss) justly observes that this proposition is affirmed in too absolute a manner, and he clearly proves from historical facts that his criticism is well-founded.

No doubt neither a private individual nor a private society, *as such*, are sovereigns, nor can they exercise any rights of sovereignty. This does not require proof.

But by virtue of what principle of international law can it be shown that he who to-day is simply a private individual, may not to-morrow be a sovereign and in possession of full sovereign power?

No such principle exists.

It has never been upheld by any writer on international law, and the whole history of mankind from the earliest times to the present day contradicts it.

Private individuals can become sovereigns and exercise rights of sovereignty in two ways.

1. By themselves creating a State; that is to say, by establishing on a territory belonging to them, a community with a regular government, and legal instruments of public authority; in a word, with the constituent elements of a State.[1] According to ancient legends, traditions, and positive history, most of the earlier States were thus formed.

The States of the Middle Ages had a similar origin. The Franks, the Visigoths, the Ostrogoths, the Burgundians and others were only nomadic tribes with chiefs, who being according to international law, private individuals, founded States.

The Italian Republics of the Middle Ages were only municipalities without international sovereignty, and they became Sovereign States.

Private individuals, poor fishermen, drew the Republic of Venice from the waves of the Adriatic, and made of her a Queen.

Nearly all the States of New England in America were founded by private individuals.[2]

States to *exist* do not require to be recognised by other States. Those who founded them are their sovereigns and have the right to exercise sovereignty, so long as this exercise has not been delegated to any authority established by the constitution of the State.

[1] See the authors cited on pages 4 and 5.

[2] See *History of Bancroft and Carlier.*

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And a revolution which results in detaching from a State one of its portions, is it not in its beginning the work of private individuals?

And these private individuals, if they succeed in their enterprise, can form a simple province or provinces into a new Sovereign State, and then exercise sovereign rights.

And if to-day private individuals established themselves on a desert island, or on territory unoccupied by any other State, they could establish a new State with all her rights of sovereignty.

We have seen Texas thus formed.

2. A private individual can become a sovereign, by succeeding to another sovereign in the exercise of the sovereignty of a State. From a private individual he becomes a sovereign.

The question as to whether a private individual can accept sovereignty when the internal laws of his own country prohibit him from doing so is not connected with our subject, we may put it aside.

Philip, Duke of Anjou, great grandson of Louis XIV., was from the point of view of international law a private individual. After the death of Charles II., and in consequence of the treaty of Utrecht, the States belonging to the crown of Spain were dismembered, and Philip V. being recognised as king of Spain acquired a portion of the States of the Spanish Monarchy.

Other instances might be cited.

When a prince was elected King of Germany, he became a sovereign, having been before a private individual.

And when one chief of an African tribe forming a sovereign State, cedes to a private individual in full sovereignty, a portion of his State, what does he do but call upon another person to exercise the rights of sovereignty over a portion of his States, which have been made into a new State?

What difference is there between the case where a European prince is called as sovereign to a State, or to a portion of a State, and that where an African chief calls upon a private individual to exercise sovereign power over a portion of his States?

No doubt there is a great difference in fact, but in law there is none, and it is the question of law that we have to study here.

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It is even possible that a private individual should remain a *subject of the State* to which he belongs and yet be *sovereign of another country.* The sovereign, therefore, may have a double personality. Thus Ernest Augustus and George V., Dukes of Cumberland, were subjects of Queen Victoria and peers of England, and at the same time kings of Hanover; in 1787 the sovereign bishop of the principality of Osnabruck, the Duke of York, sat as a peer of England in the House of Lords.[1]

The question as put at the head of this paper is comparatively new—it has neither been foreseen nor treated of in works on international law.

Several authors treat a question touching on this one, but which greatly differs from it. They ask if a private individual could in his own name occupy newly-discovered and unowned territory? They reply in the negative to this question, and, from the point of view from which they consider it, they are right. For those who discover new territories are in most cases sailors belonging to some vessel of State, often officers of the State, or private individuals commissioned by their Government, and, being mandatories of the Government, they cannot occupy in their own names.

The theory that rights of sovereignty can be ceded to private individuals receives powerful support from some recent transactions, namely, from the treaties concluded between the Sultans of Burnei and of Sulu, and Mr. Dent and Baron d'Overbeck, who in their turn have ceded their rights to a private company—*The British North Borneo Company.*

This fact possesses a special importance, as a new event enriching the science of law. But what more particularly furnishes a strong argument in favour of our theory is the way in which this event has been appreciated, either implicitly or explicitly, by several Governments, by jurisconsults, and by eminent politicians, whose opinion may be regarded as authoritative.

The opinion of publicists and jurisconsults ranks amongst the sources of international law.[2]

The governments of Holland and of Spain, who con-

[1] Heffter, *Le Droit international public*, § 52, p. 104.

[2] See Wheaton, f. i. § 12, p. 25; Heffter, § 8, p. 16.

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sidered themselves most directly concerned in the concessions made by the Sultans of Borneo, did not deny the principle of the capability of individuals or of associations to become grantees of the right of sovereignty, but they raised objections to these treaties on account of previously-acquired rights.

We may quote here the remarks made by M. de Laveleye[1] on the debates which took place in the English Parliament about the charter of incorporation granted to the British North Borneo Company:

'Certain members of the Left, opponents of what is called in England "imperial policy"—that is to say, of that policy which seeks extension of territory and influence—criticised the measure because it created new responsibilities for the country, but no one contested the rights of the individuals or of the company—rights resulting from treaties concluded with native chiefs.'

In the reply made in the House of Commons by the Attorney-General, Sir Henry James, on March 17, 1882, we read: 'These rights had been ceded to the company, and had legally become their property. Her Majesty's Government had no power to enter into the general question as to the expediency of the occupation of Borneo by a commercial company. It would be an act of confiscation if, after what had occurred, the Government tried to wrest from it the rights it had acquired. . . . . The only question which the Government had to decide was, whether it should or should not leave the company to act without hindrance, and entirely without control.'

Mr. Gladstone was no less affirmative. 'The charter,' said he, at the same sitting, 'has not conferred upon the company a single privilege over and above what it had already acquired, by virtue of a sufficient title, to enable it to exercise all its powers. . . . .'

From the explanations given by Lord Granville in the House of Lords (March 13, 1882), it appears that, if Holland and Spain protested against the rights asserted by the Overbeck-Dent Company, it was in virtue of previous rights which these States claimed to possess over the northern portion of Borneo.

[1] *Review of International Law*, vol. xv. pp. 258, 259.

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But neither they nor Germany—formally consulted on the subject by the British Government—expressed any doubt as to the power of individuals or of companies to obtain from uncivilised sovereigns the concession of rights implying the exercise of sovereignty. This power was not denied, either, by the Opposition in the House of Commons.

Thus the opinion of four Governments, of two English Ministers—Lord Granville and Mr. Gladstone—of the Attorney-General, Sir Henry James, of Sir Travers Twiss, and of M. Laveleye, to which we may add the considerations put forward in the 'Open Letter,' addressed on April 25, 1883, by a member of the African International Association, to the *United States Courier*, form a mass of authority sufficiently strong to confirm us in our opinion, if we had experienced any doubts.

We will conclude with three observations:

1. It is clear that should objections, founded on previously acquired rights, be raised by any power against similar concessions, made by chiefs of savage tribes to private individuals or to associations, these objections ought to be carefully examined. They might, perhaps, be referred to arbitration in the same way that Great Britain and Portugal, in 1875, submitted the dispute with regard to certain lands situate in Delagoa Bay, to the arbitration of the President of the French Republic, M. Mac Mahon.

2. *New sovereignties—at the head of which were private individuals or associations—grantees of chiefs of savage tribes, would exist by their own right and their own strength, without requiring the acknowledgment of other States.*

See Klüber, § 23.

Heffter, § 23 (pp. 42, 43), and § 51 (p. 104).

Bluntschli, § 28–38, and all authors.

It depends on the convenience of other States to recognise or not these new sovereignties.

But whatever may be their decision with respect to this, the want of recognition will give them no right to act as if these sovereignties did not exist, or to look upon their territory as capable of *occupation*.

3. According to the practice of international law now in use, the recognition of the grantee of the sovereignty, as sove-

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reign, might be demanded in certain cases. Nearly all Governments, notably Great Britain and the United States of Northern America,[1] have adopted the rule of considering the Govenment in fact as the legitimate Government with regard to themselves. See Heffter, § 51–53 (pp. 101–105).

Suppose that a European nation had concluded a treaty of friendship or of commerce with the chief of a savage tribe inhabiting a fixed territory.

This treaty is considered as made, and is, in fact, made with the State represented by the chief. The chief has ceded his rights of sovereignty to a European individual, or to a European association, who have taken effective possession of the sovereignty. Could the European nation deny the legitimacy of this new government, supposing it to be a government in fact?

According to international usage, *No*; Great Britain and the United States, at least, would recognise it, and probably other States as well. And if the first chief had been displaced by an internal revolution—which might just as well break out among the blacks as among the whites— or if the black chief had ceded his sovereignty to another black, a relation, or even a stranger to his family, would that be a reason for refusing recognition to the new sovereign?

And if the chief of the tribe had ceded his sovereignty to a white man, or to an association of white men, instead of choosing a black man as his successor, surely the difference in colour could be no reason for refusing recognition to the new sovereign.

It is evident that when once true and simple principles are abandoned difficulties of every kind occur.

For the reasons above mentioned, I, the undersigned, am of opinion that the independent chiefs of savage tribes can validly cede to private individuals the whole or a portion of their States, together with the sovereign rights which belong to them, in conformity with the traditional customs of the country.

[1] See the Manifesto of President Monroe of December 2, 1823.

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